Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench at Ahmedabad

REGIONAL BENCH-COURT NO. 3

Excise Appeal No. 11135 of 2019 – DB

(Arising out of OIA-CCESA-SRT-APPEALS-PS-747-748--2017-18 dated 29/01/2019 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-SURAT-I)

Kesar Impex ....**Appellant**
S No 216/3, Plot No 11, Canal Road
Dadra, Silvassa
Dadara And Nagar Haveli

VERSUS

Commissioner of C.E. & S.T.-Daman ......**Respondent**
3rd Floor...Adarsh Dham Building,
Vapi-Daman Road, Vapi
Opp.Vapi Town Police Station,
Vapi, Gujarat- 396191

APPEARANCE:
Shri Ankur Upadhyay, Advocate for the Appellant
Shri R R Kurup, Superintendent (AR) for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. C L MAHAR

Final Order No. 12906/2024

DATE OF HEARING: 26.09.2024
DATE OF DECISION: 29.11.2024

RAMESH NAIR

This appeal has been filed against the Orders-in-Appeal No. CCESA-SRT/(APPEALS)/PS-747-748/2017-18 dated 29.01.2019 passed by the Commissioner (Appeals), Surat.

1.1 Brief facts of the case are that on the basis of intelligence that the Appellant are indulged in the evasion of Central Excise Duty by diversion of duty paid inputs i.e. imported plastic granules of various grades from Mumbai port to Halol, Ahmedabad, Vadodara, Vapi, etc. and are availing the Cenvat credit of duty paid on such diverted plastic granules without actual receipts of the same in their factory, search operations were conducted on 03.12.2015 by the officers of DGCEI, officers who visited the factory premises of the Appellant for preventive checks alongwith two independent panchas and searched their factory premises. During the search shortage of 230982 kgs of Cenvatable raw material (Plastic Granules) and 75701.45 Kgs. of Finished goods was noticed. The said shortage has been accepted by partner of Appellant. Further it was alleged that the Appellant have availed the Cenvat credit on the basis of invoices issued by M/s Sidhhi Trading Corporation, Thane, M/s Eskay-Bee International P. Ltd., M/s Deluxe Karran Imports Pvt. Ltd. and M/s Kookey Multitrading Pvt. Ltd. To give the genuine colour of transactions between them, they have managed the LRs of transporters. Revenue recorded the statement of various witnesses. Accordingly, a show cause notice was issued to the Appellants demanding Central Excise Duty equivalent to the Cenvat Credit taken amounting to Rs. 72,91,056/- and in respect of finished goods involving Central Excise Duty of Rs. 9,93,922/- alongwith interest and imposition of penalties. In adjudication, the original authority confirmed the demand along with interest and imposed penalty. Aggrieved by such order, the appellants preferred appeal before the commissioner (Appeals) who upheld the same vide impugned order-in-appeal dated 29.01.2019. Hence these appeals.

2. Shri Ankur Upadhay, Learned Advocate appeared on behalf of Appellants and submits that the Learned Commissioner (Appeals) has passed the impugned order without meticulously dealing with the issue in hand and therefore committed a grave error in disallowing the Cenvat credit to the Appellant as there is not a single piece of evidence available on record on the basis of which it can be ascertained that the inputs i.e. plastic granules has not been received by the Appellant. Further the department allegation is based on assumption and presumption that the input after clearance from Mumbai port has been delivered to Halol, Ahmedabad, Baroda, Vapi other than factory premises of the Appellant as said allegation is not supported with any corroborative evidence. Hence the contention made by the department for denying the Cenvat credit is frivolous and without any basis. Also, not a single piece of evidence is available on record regarding alleged clandestine clearance of the goods by the Appellant, thus said demand is also liable to be dropped and impugned order is liable to be set aside.

2.1 He also submits that the department have relied upon the statements of transporters alongwith other persons for alleging non-receipt of the inputs in the factory of the Appellant and regarding clandestine clearance of the goods. In this context appellant, requested for cross-examination of the persons alongwith Deepash Shah Alias Nanubhai, Panchas of the Panchanam dated 03.12.2015, investigating officers of DGCEI and drivers of the vehicle who transported the disputed goods. Whereas, out of total witnesses, only three witnesses were cross-examined and remaining witnesses, i.e. Shri Amish Shah, M/s Esaky Bee International Pvt. Ltd., Shri Bhushan Paran, Kookey Multitrading Pvt. Ltd., Shri Vujay Thakkar, M/s. Siddhi Trading Corporation, Shri Abhishek Kanojiya, M/s. Deluxe Karan Imports Pvt. Ltd. whose cross-examination could not be done due to non production of witnesses, thus said statement can not be relied upon by the department in the interest of justice as the said statement has not been cross-examined. Also, Cross-examination of Shri Deepesh Shah Alias Nanubhai, Panchas of the panchanama dated 03.12.2015, investigating officers of DGCEI were denied by the Adjudicating authority which also can not be relied upon by the department.

2.2 He further submits that from the cross-examination of 3 persons, i.e. Shri Jagdish Bhadra, proprietor of M/s. Kaveri Roadlines and Jatinbhai Naginbhai Bhandari, Ex-Managers of Western Transport and Leherbhai Bhanushali which is para 10 of the appeal it can be seen that nothing increment is coming on record regarding diversion of input or clandestine clearance of the goods. Thus, said statement cannot be relied upon by the department.

2.3 He also submits that Shri Kishor T. Bhanushali partner of Appellant firm retracted his statement dated 03.12.2015 vide affidavit dated 04.12.2015 and statement dated 07.04.2016 vide affidavit dated 07.04.2016, thus the above statement does not have evidentiary value, hence cannot be relied upon by the department.

2.4 He further submits that no investigation was made from the driver of the vehicle who transported the goods as statement of the driver of the transporter who had loaded the goods from Mumbai port and the actual place of delivery if any other then the factory premises of the Appellant could have been determined. Thus, inquiry made by the department is incomplete and the inputs has been genuinely received by the Appellant in their factory premises.

2.5 He also submits that the statement of the Transporters are not corroborated with any other evidences thus demand cannot be confirmed on the basis of the third party statements.

2.6 He placed reliance on the following judgments in support of above arguments:-

- Basudev Garg -2013(294)ELT 353 (Del.)

- Kelvin Industries Vs. CCE, Rajkot –(2023)3 Centax 252(Tri. Ahm.)
- Motabhai Iron & Steel Industries Vs. CCE, Ahmedabad –II [2014 (302) ELT 69 (Tri. Ahm)]
- Commissioner Vs. Motabhai Iron & Steel Industries -2015(316)ELT 374 (Guj.)

3. On the other hand, Shri Rajesh R. Kurup, Learned Superintendent (AR) appearing on behalf of the revenue reiterates the findings of the impugned order. He placed reliance on the following judgments:-

- Commissioner of CGST and Central Excise, Howrah Vs. Ashirwad Foundries Pvt. Ltd. – (2023) 4 Centax 265 (Cal.)
- Krishan Screen Art Vs. Commissioner of Central Excise -2015(316)ELT 534 (Guj.)
- G.T.C. Industries Ltd. Vs. Collector of Central Excise -2023(384) ELT 239(SC)

4. Heard both sides and perused the appeal records. We find that the case of the revenue is that appellant diverted the raw material and clandestinely removed finished goods.

4.1 The demand of Rs. 9,93,922/- was confirmed in respect of shortages of finished goods detected at the time of visit of the officers. Department contended that the said shortage was admitted by the Shri Kishore Tusidas Bhanusali, partner of Appellant firm. Appellants have strongly contended that there is no shortage of finished goods. Proper panchnama have not been drawn for the physical availability of goods in various sections/sheds of the factory premises. Both the authorities have not taken into account of the CCTV footage of 03.12.2015. Further the cross-examination of panch witnesses and DGCEI officers have been denied and statements of the partner is retracted. We find that apart from the shortages, there is virtually no other evidence on record to reflect upon the alleged clandestine activities of the appellant. As per the settled law such shortages, by themselves, cannot lead to the fact of clandestine removals so as to justify confirmation of demands. Reference can be made to the Hon'ble Allahabad High Court decision in the case of *Minakshi Castings* reported in 2011 (274) E.L.T. 180 (All.) as also the Hon'ble Punjab & Haryana High Court in the case of *CCE, Ludhiana* v. *Nexo Products (India)* reported in 2015 (325) E.L.T. 106 (P & H) and to another decision of the Hon'ble Punjab & Haryana High Court in the case of *C.C.E. & S.T., Ludhiana* v. *Anand Founders & Engineers* reported as 2016 (331) E.L.T. 340 (P & H). It stand held on the above decisions that the clandestine removal charges based on shortages in stock cannot be upheld in the absence of any other evidence brought on record by the Revenue showing such illegal activities on the part of an assessee. The said decisions stand followed by the Tribunal in many numbers of cases.

4.2 Inasmuch as in the present case the entire case of the Revenue is based upon the shortages detected at the time of visit of the officers, without there being any other evidence. It is seen that the judicial view is that the stock taking would be conducted in a proper manner and considering all the stock lying in the factory. It cannot be on the basis of eye estimation or otherwise. The Hon'ble Gujarat High Court in the matter of *Commissioner of Central Excise, Customs & S. Tax, Daman* v. *Nissan Thermoware Pvt. Ltd.* reported in 2011 (266) E.L.T. 45 (Guj.), observed that mere statement of the representative of the assessee at the time of stock verification is not sufficient which was retracted subsequently. The confessional statement of an accused in criminal proceedings cannot be put on a par with a statement recorded during preventive checks. In the present case, we find that Appellant claimed that the said materials were lying at their factory and during the search officers not considered the finished goods available in various sections/sheds, appellant also produced the CCTV footage which was also not considered by both the adjudicating authority and no enquiry was conducted thereon. Moreover, retraction of statements of partner of appellant firm was also not considered by the revenue. In these circumstances, shortage found at the time of physical verification is not sustainable and that the allegations in the instant case of clandestine removal of the finished goods is not sustainable Accordingly, demand on this account is set aside.

4.3 Now, we coming to the second issue regarding denial of Cenvat credit of Rs. 72,91,056/- on the allegation that the appellant has availed Cenvat Credit on the strength of invoices issued by M/s. Siddhi Trading Corporation, M/s Eskay-Bee International Pvt. Ltd., M/s. Deluxe Karan Imports Pvt. Ltd. and M/s. Kookey Multi Trading Corporation without receipts of the inputs in their factory. To make such allegation, revenue mainly relied upon the statements of Transporters, Dealers. We find that Appellant requested for cross-examination of all the witnesses. Out of total witnesses only 3 witnesses were cross-examined. On perusal of orders we find that the request for cross-examination of the persons whose statements have been relied upon has been turned down on the ground that witnesses did not appear for cross –

examination. The reasons assigned by the Ld. Adjudicating authority below to reject cross-examination is clearly unsustainable in legal parlance for the obvious reason that no adverse inference can be drawn against assessee whose statements are to be relied by the Revenue without ascertaining the veracity in the absence of cross-examination. In an almost identical situation, this Tribunal in the case of *Arsh Castings Pvt. Ltd.* v. *CCE, Chandigarh* - 1996 (81) E.L.T. 276 (Tri.) has observed that: -

> *"8. Considered. It is not in dispute that the entire case of the Department regarding the gate passes in question being fictitious hinges on the evidence of the Partner/Director of the concerned firm of Alang (Rajkot), who according to the gate passes resumed in the instant case were consignors. From the Final Order (as extracted above) No. A/245/92-NRB, dated 25-5-1992 passed by the Tribunal, it is clear that, earlier the case was remanded to the adjudicating authority for affording an opportunity to the appellants to cross-examine the concerned persons whose statements were relied upon in the Show Cause Notice. We find from the impugned Order that still the opportunity to cross-examine the witnesses whose statements were relied upon in the Show Cause Notice was not given to the appellants. The adjudicating authority, that is to say, the Additional Collector of Central Excise, Chandigarh, has recorded his finding in paragraph 4 of the impugned order-in-original as follows: -*
>
> > *"4. Personal hearing along with cross-examination of the witness, whose statements were relied upon in the Show Cause Notice, was fixed for 27-10-1992, 9-11-1992, 12-12-1992, 23-1-1993, 10-2-1993, 30-3-1993 which was finally held on 17-5-1993. None of the witnesses turned up for cross-examination, except for written statements tendered by two of the witnesses one partner of Ganpat Rai Jai Gopal and other A.B. Gujrati, Partner of Madhaw Industrial Corporation."*
>
> *9. From the above findings of the adjudicating authority, it is obvious that the opportunity was* not *given to the appellants to* cross-*examine third parties on whose statement reliance was placed by the Department and, in fact, on whose statements the present demand has been confirmed. It is an elementary principle of natural justice and fair play that a person who is sought to be proceeded against and penalised in adjudication on the basis of third-party statements should be afforded effective opportunity to challenge the correctness of the same as per law by cross-examination, if he so desires. If witness do not turn up for cross-examination, it is open to the adjudicating authority to proceed with the adjudication without relying on these statements against the person so charged. Failure of a witness to appear for cross-examination will* not *be a ground to penalise the appellants in law when the appellant is entitled to an opportunity of cross-examination of third party on whose statement's reliance is placed. In case of L. Chandrasekhar v. Collector of Customs, supra, decided by the Tribunal applies on all fours to the present case. For ready reference, the relevant portion may be reproduced herein with advantage:-*
>
> > *"5. On going through the records, I find that the factual submission set out above and made by the Learned Counsel are correct. The Tribunal initially remanded the case for giving the appellant an opportunity of cross-examination of third parties on whose statements reliance had been placed against the appellant. In the impugned order, after remand,*

the Learned Adjudicating Authority in this context has observed as under :-

"S/Sri Sundarraj, Velusamy, Manuel Coreira, Sethu and Kalyani who were called upon for cross-examination did not turn up. The Advocates insisted on their cross-examination but it appeared that they are keeping away from their proceedings and as such the process could not be completed. Moreover, the case could not be kept in abeyance indefinitely merely on the non-availability of persons required for cross-examination."

The adjudicating authority again in the finding column in the impugned order has observed as under: -

"The opportunity by cross-examination of the witnesses also was given. But the persons summoned to appear for cross-examination before me did not turn up. It was explained to Counsel L. Chandrasekaran that the persons summoned for cross-examination appeared to keep away from their proceedings and as such the adjudication process will not be completed."

6. xx xx xx"

10. Besides, the case of Pahar Chand & Sons v. The State of Punjab, (1972) 30 STC 211, decided by the Division Bench of the Punjab & Haryana High Court (cited by the appellants in the memo of appeals) also applies on all fours to the present case. In that case also, the Sales Tax Assessing Authorities under the Sales Tax Act were treating the sales recorded in the books of accounts as fictitious and the assessing authorities relied upon the testimony of the witnesses without giving opportunity of cross-examination to the assessee therein. Setting aside the assessment, the Court observed (1) that "if the assessing authority was relying on the testimony of a witnesses, the assessee should have been afforded an opportunity to cross-examine. It was not open to the assessing authority to get over this hurdle on the plea that the witness had not been produced by the assessee; and (2) that the assessing authority acted on material which was not legal, to come to the conclusion that the sales were fictitious. [Head Note (2) & (3)]. The same view was taken by the Division Bench of the Mysore High Court in the case of Neminath Appayya v. Jamboorao, AIR 1966 Mysore 154, wherein it was held that the evidence of the witness must be excluded from consideration when there is a failure to give opportunity to cross-examine the witness.

11. In view of the above, the statement of the witnesses on whom the Department is relying upon has to be disregarded. If that be so, nothing remains on record to prove that the gate passes so resumed were fictitious."

4.5 We find that the statement of persons whose cross-examination was allowed but they do not turn up for cross-examination cannot be relied upon and have to be excluded from evidences. On the basis of said statements no cenvat demand is sustainable. Revenue if chooses not to examine any witnesses in adjudication their statement are not considerable as evidence. We find that the Tribunal in the case of *Nidhi Auto* 2020 (33) G.S.T.L. 419

(Tribunal) (Supra), while relying on the ratio laid down by the Hon'ble High Court in the case of *Parmarth Iron Pvt. Ltd.* has held that when the Revenue does not allow cross-examination of any prosecution witness then Revenue cannot rely on the statement given by such prosecution witness for confirmation of demand. In this context we also find the support from following judgments: -

- Nu- Trend Business Machines (P) Ltd. Vs. Commissioner , Chennai - 2002 (141) E.L.T. 119 (Tri. - Chennai)
- Commissioner of Central Excise Meerut-I Vs. Parmarth Iron Pvt. Ltd. - 2010 (260) E.L.T. 514 (All.)
- Madhura Ingots & Steel Co. Pvt. Ltd. Vs. Commr. Of CGST &CX, Ranch - 2022 (380) E.L.T. 334 (Tri. - Kolkata)

4.6 So far as the admission of Mr. Kishor, T, Bhanusail, partner of Appellant during investigation, of having availed irregular Cenvat credit, as claimed by Revenue, we also find that Shri Kishor T. Bhanusail, partner of M/s. Kesar Impex retracted his statement dated 03.10.2015 vide affidavit dated 04.12.2015 and statement dated 07.04.2016 vide affidavit dated 07.04.2016, thus the above statements do not have evidentiary value.

4.7 We also find that in the present matter contrary to the allegations of the department the fact that the Appellant have duly recorded the receipt of the goods in their Raw materials account, the purchase transactions of the raw material under in question were booked in books of account. The Appellant has also shown the use of disputed inputs in their factory premises for manufacture of finished goods, even the payment of transportation was also made for transportation. The Revenue could not bring any evidence that the goods covered under the said raw material invoices were diverted to any other place. It is also not the case of the department that the Appellant have procured some unaccounted inputs/raw materials to cover up the quantity of input shown in their books of accounts. Moreover, in the present matter revenue could not find out any single buyer of the alleged diverted inputs.

4.8 We also find that in the present matter receipts of the goods in factory clearly established by the Appellant with documentary evidences. Further, the investigation is silent as to how the Appellant-manufacturer, manufactured finished material without receiving the inputs. The law is settled that as long as duty payment is accepted on outputs, the benefit of credit available on input cannot be denied. Therefore, there are no substantial evidences which result the disallowance of credit. In this circumstance, we do not agree with the finding of Learned Commissioner (Appeals).

4.9 We further find that the appellant have satisfied the requirement of receipt of inputs along with cenvatable invoices in their factory and accordingly, the Cenvat credit taken by them is in accordance with the scheme of the Act read with Cenvat Credit Rules.

5. Therefore, we set aside the impugned order. Consequently, appeal is allowed with consequential relief, if any.

(Pronounced in the open court on 29.11.2024)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(C L MAHAR)
MEMBER (TECHNICAL)

Raksha